No. 9204

In the United States Circuit Court of Appeals for the Ninth Circuit

COUNTY OF FRESNO AND WALTER S. HENDERSON, JR., ASSESSOR OF THE COUNTY OF FRESNO, STATE OF CALIFORNIA, APPELLANTS

v.

COMMODITY CREDIT CORPORATION, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

APPELLEE'S REPLY TO APPELLANTS' SUPPLEMENTAL BRIEF

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Upon the oral argument of this case the counsel were directed by the Court to file supplemental briefs on the question—

Whether, under the statutes of the State of California, personal property taxes are entitled to priority in payment over a private lien holder prior in time.

Appellee, in conformity with the directions of the Court, submits the following memorandum of its views on the above question.

UNDER CALIFORNIA STATUTES PERSONAL PROPERTY TAXES ARE NOT ENTITLED TO PRIORITY IN PAYMENT OVER A PRIVATE LIEN PRIOR IN TIME

A. The question whether California personal property taxes are entitled to priority in payment over a

private lien, prior in time, is to be answered only by first determining whether California statutes provide that personal property taxes constitute (1) a lien upon specific personal property taxed, and (2) if the payment of personal property taxes is secured by a lien on specific personal property, whether these statutes or the general law of California declare that the lien for the payment of personal property taxes is paramount or prior to a private lien which is prior in time.

It is the almost universally accepted rule that taxes are not inherently a lien upon specifically taxed property or other property of a taxpayer unless expressly made so by statute. In 3 Cooley, Taxation (4th Ed., 1924), Section 1230, pp. 2451–2453, the author states the rule as follows:

> The general rule is that taxes are not a lien unless expressly made so by statute or ordinance; and a statute to create a tax lien must expressly provide for the lien, or the implication must be so plain as to be equivalent to positive language. When liens are expressly created they are not to be enlarged by construction. If, therefore, the statute in terms makes the tax a lien on one species of property, it will not by intendment be extended to any other species. * * *

Appellants' contention (Supp. Br. 12–14) that a tax *"ex proprio vigore"* is entitled to priority in payment over pre-existing private liens on specific property, while having some support in earlier decisions, is in advocacy of a principle which later decisions have repudiated. See the exhaustive treatment of the question in *Priority of Tax and Special Assessment Liens,* by

J. C. Peppin, 23 Cal. L. Rev. 264, 267, 270. The author of *Priority of Tax and Special Assessment Liens, supra,* states (p. 267):

> The view is now almost universal that taxes are not inherently a "lien" either on the property taxed or on any other property of the taxpayer, but are a lien if, and only if, they are expressly made so by statute.[14]

And (p. 270):

> * * * the trend has been so completely away from * * * the "superior dignity" principle * * * that it may be asserted with a definite degree of assurance that such view has been definitely discredited; and that the presently approved view is that a tax lien is not inherently superior to private liens, but is superior thereto if, and only if, it is expressly provided to be so by statute. * * * [Citing cases.]

The cases cited by the appellants (Supp. Br. 13), *California Loan Etc. Co.* v. *Weis,* 118 Cal. 489, 50 Pac. 697; *O'Dea* v. *Mitchell,* 144 Cal. 374, 381, 77 Pac. 1020, 1022; *Woodill & Hulse Elec. Co.* v. *Young,* 180 Cal. 667, 669, 670, 182 Pac. 422, 424; *San Mateo County Bank* v. *Dupret,* 124 Cal. App. 395, 396, 12 P. (2d) 669, 670, as showing that the California courts have adopted "the

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[14] This principle is now almost universally recognized. Many cases are cited in 3 Cooley, Taxation (4th ed. 1924) § 1230; 4 Dillon, Municipal Corporations (5th ed. 1911) § 1420. A leading case is *Jaffray* v. *Anderson* (1885), 66 Iowa 718, 24 N. W. 527. *The rule is recognized in California. Boskowitz* v. *Thompson (1904), 144 Cal. 724, 730, 78 Pac. 290, 291; Escondido* v. *Escondido Lumber Co. (1908) 8 Cal. App. 435, 439, 97 Pac. 197, 198; 24 Cal. Juris. (1926) 217.* [Italics ours.]

superior dignity" principle, do not support that view. Those cases arose under statutes which expressly provided a lien for the taxes and the questions in those cases were the relative priority between admitted liens which is a question totally different from the one at bar. Moreover, we are unable to find in those cases any declaration of the principle that in California a tax *ex proprio vigore* constitutes a lien on specific personal property. Significantly, if *California Loan Etc. Co.* v. *Weis, supra,* and *O'Dea* v. *Mitchell, supra,* may be considered as holding that tax liens are inherently fixed liens, those decisions were repudiated in *Gwinn* v. *McReynolds,* 177 Cal. 230, where the court held that a governmental charge against lands, considered by the court as controlled by the principles applicable to tax liens, was a lien merely under the statute expressly creating it and furthermore held that that lien subordinate to the lien of a prior mortgage. For a helpful discussion of these cases, see *Priority of Tax and Special Assessment Liens, supra* (pp. 272–273).

B. We have examined the California statutes and find no provision creating a lien on *personal property* for personal property taxes assessed either against the specific personal property or other personal property owned by taxpayer. Section 3717 of Deering's Political Code of California (1937) provides merely that (p. 617):

> Every tax due upon personal property is a lien upon the real property of the owner thereof, * * *.

The appellants state (Supp. Br. 17):

> * * * it is true that there is no specific language in Title IX of the Political Code which specifically creates a lien on personal property, * * *.

Therefore, it would seem that the appellants have no lien for the payment of the local taxes which are here in question and are entitled to no priority in payment over the appellee's admitted liens which are prior in time.

Pointing to Section 3716 of Deering's Political Code of California (1937) which provides (pp. 616–617):

> Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof; provided, that the lien of every tax whether now existing or hereafter attaching shall cease to exist for all purposes after thirty years from the time said tax became a lien; * * *

The appellants argue that upon seizure or distraint of personal property, the local taxing jurisdiction acquires a lien entitled to priority. This argument ignores the lien interest of the appellee in the specific personal property in question which is prior in time to the seizure and distraint and would without statutory authority displace the appellee's prior lien interest in the property by subordinating it to an alleged lien for

personal property taxes which did not previously exist and could not exist, as we have pointed out, without statutory authority or support. The argument is inapplicable here for the reason that we are here concerned with a question of a priority which existed prior to assessment and distraint and which, in the absence of statute, is not to be precluded or subordinated to subsequent claims or rights whether for taxes or otherwise.

Respectfully submitted.

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